

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review –)	
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	MB Docket No. 06-121
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review – Review)	
of the Commission’s Broadcast Ownership)	MB Docket No. 02-277
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

COMMENTS OF ION MEDIA NETWORKS

John R. Feore, Jr.
Jason E. Rademacher

Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

Its Attorneys

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SUMMARY

Congress forbid the Commission from considering the UHF Discount in this proceeding by removing the national audience reach cap and all rules related to it from consideration as part of the periodic review process. Congress established the 39% national audience reach cap by statute and restricted the Commission from considering that cap or any rules related to it as part of any quadrennial review. In its decision reviewing the *2003 Biennial Ownership Order* the Third Circuit Court of Appeals confirmed that Congress removed the UHF Discount from periodic review and, consequently, from further consideration as part of the 2002 Biennial Review remand. There is therefore no basis whatsoever for making the UHF Discount a part of this proceeding.

Even if Congress had preserved the Commission's authority to consider the UHF Discount in this proceeding (and it has not), the public interest could not support eliminating the UHF Discount either immediately or at any foreseeable point in the future. The Commission found just three years ago that the UHF Discount continues to remedy the persistent signal handicap that has relegated UHF stations to second-class status in many markets. This condition has not changed since then and will not change so long as stations continue to operate on their analog channels.

Moreover, while the conventional wisdom is that the DTV transition will eliminate the need for the UHF Discount, there actually is no hard evidence that the transition will have this effect. The handicap placed on UHF stations by their historical signal inferiority has become ingrained so that many UHF stations' ability to compete for network affiliation and advertising revenue has been impaired, perhaps permanently. None of the changes promised by the DTV transition will directly work to counteract this handicap. As a consequence, the public interest likely will demand that the UHF Discount be retained in some form or another, even after the

DTV transition.

These complex issues demand a separate rulemaking proceeding so that the Commission can compile a full record regarding the ongoing need for the UHF Discount. For 21 years, the UHF Discount has played a key role in the survival of numerous UHF stations nationwide and in the creation and emergence of new television networks like ION and Univision. No evidence that has been submitted to the Commission supports dispensing with the UHF Discount, whereas voluminous evidence the Commission has seen supports preserving it in some form. If the Commission wishes to consider modifying the UHF Discount to account for the improvements to UHF stations' competitiveness, it should commence a separate proceeding and build a record that helps determine precisely what those improvements will be, whether they will benefit all historically UHF stations, and whether their effect in ameliorating the UHF handicap will be immediate or will only be realized in the long-term. The Commission cannot determine these questions on the limited record likely to be produced in this omnibus proceeding.

All law, policy, and common sense counsels the Commission to refrain from considering the UHF Discount as part of this proceeding. The Commission should not consider the UHF Discount further in this docket and should instead announce that it will commence a separate proceeding at some point near the end of the DTV transition to consider the complex and important issues implicated by modification of the UHF Discount.

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COMMENTS OF ION MEDIA NETWORKS

ION Media Networks (“ION”), by its attorneys and pursuant to Section 1.415 of the Commission’s rules, hereby submits these comments regarding the Commission’s UHF Discount inquiries in the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹

¹ 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, *Further Notice of Proposed Rulemaking*, MB Docket Nos. 06-121, 02-277; MM Docket Nos. 01-235, 01-317, 00-244, FCC 06-93, at ¶¶ 34-36 (released July 24, 2006) (the “FNPRM”); *see also*

INTRODUCTION

The Consolidated Appropriations Act of 2004² as construed by the Third Circuit in *Prometheus Radio Project v. Federal Communications Commission*,³ forecloses consideration of the UHF Discount in this or any other periodic review of the Commission's media ownership rules. Both the statute and the Third Circuit's ruling made it abundantly clear that Congress has prohibited the Commission from evaluating or changing the UHF Discount as part of the periodic review process – which necessarily includes not only the Commission's 2006 Quadrennial Review but also the Commission's reconsideration on remand of its 2002 Biennial Review⁴ – and that the Commission can evaluate the UHF Discount only in a separate proceeding.⁵

The technical and policy issues implicated by immediate or future changes to the UHF Discount are too complex and important to be dealt with appropriately in this omnibus ownership rule review. As ION has shown in the past, before making any changes to the UHF Discount, the Commission must engage in a thorough and sophisticated analysis of: (1) the persistent historical handicap that UHF stations have borne and continue to bear; (2) how, if at all, the DTV transition will remedy that historical inequity; and (3) if so, whether that remedy will be

Order, MB Docket No. 06-121, *et al.*, DA 06-1663 (released September 18, 2006) (granting extension of time to file comments until October 23, 2006).

² *Consolidated Appropriations Act, 2004*, H.R. 2673, 108th Cong. § 629 (2004) (“CAA”).

³ 373 F.3d 372 (3d Cir. 2004).

⁴ The *Prometheus Court* described court challenges to retention of the UHF Discount as “moot” because “any relief [the court] granted on these claims would undermine Congress’s specification of a precise 39% cap.” *Id.* at 396.

⁵ *Id.* at 397 (“[W]e find that the UHF Discount is insulated from this and future periodic review requirements . . . [T]he Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF Discount *outside the context of 202(h)*.” (emphasis added)).

immediate or will be realized over time.⁶ When the Commission reviews these issues, it will find – as it repeatedly has found in the past – that the UHF Discount continues to serve an important function in leveling the playing field between historically strong-signal VHF stations (typically affiliated with the top 4 networks) and their historically weak-signal UHF counterparts (typically unaffiliated or affiliated with emerging networks).⁷ The UHF Discount continues to be necessary because the signal disparity between analog UHF and VHF stations typically has persisted and has translated into a competitive handicap that has diminished UHF stations’ opportunities for major network affiliation and has impaired their ability to compete for advertising revenue.⁸

Once the Commission gives these issues the attention they demand, it will find that the competitive disparity between historically VHF and historically UHF stations will not simply vanish with the transition to DTV, even if some historical UHF stations have been granted VHF DTV channels or been given the opportunity to maximize their facilities. Though the UHF handicap had its roots in the signal weakness of analog UHF stations, it now goes much deeper and reflects years of network and advertiser preference for VHF stations on low-numbered channels over UHF stations on high-numbered channels. Because the channel mapping used by

⁶ See, e.g., Reply Comments of Paxson Communications Corporation, MB Docket No. 02-277 at 9-10 (filed March 29, 2004); Comments of Paxson Communications Corporation, MB Docket No. 02-277 at 13-17 (filed March 19, 2004); Petition for Reconsideration of Paxson Communications Corporation, MB Docket No. 02-277 at 4-6 (filed September 4, 2003); Letter from Counsel for Paxson, to Marlene Dortch, dated May 30, 2003. ION previously participated in this proceeding under its former corporate name, Paxson Communications Corporation.

⁷ See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13711-47 (2003) (“2003 Biennial Ownership Order”); 1998 Biennial Regulatory Review, *Biennial Review Report*, 15 FCC Rcd 11058, ¶¶ 25-30 (2000) (“2000 Biennial Review Report”).

⁸ 2003 Biennial Ownership Order, ¶¶ 587-89.

DTV viewer interfaces will result in stations maintaining their analog channel position,⁹ there is no reason to think that network and advertiser preference will change, regardless of whether traditionally weak-signal UHF stations have been granted a VHF DTV allotment on a low-numbered channel. In many markets the UHF handicap will survive the DTV transition and continue to afflict stations that historically have suffered from the deficiency of UHF signal strength. Regardless of the meaning of the CAA, therefore, proper consideration of these intricate issues warrants a separate rulemaking proceeding. Because Congress already has spoken to this issue, however, there is no question that the UHF Discount can be considered only in a separate future rulemaking proceeding.

I. The Plain Language of the CAA and the Third Circuit's Decision in *Prometheus* Unambiguously Preclude Consideration of the UHF Discount in this Proceeding.

The Commission has previously received extensive written comments from ION and other parties demonstrating that the plain language of the CAA removes the UHF Discount from the set of ownership rules that the Commission may consider as part of its periodic ownership rule reviews.¹⁰ Specifically, by establishing the new 39% national ownership cap, Congress defined the cap as limiting "National audience reach," the calculation of which has included the 50% UHF Discount since 1985.¹¹ Basic canons of statutory construction require the assumption

⁹ Second Periodic Review of the Commission's Rules and Policies Affecting the Transition to Digital Television, *Report and Order*, 19 FCC Rcd 18279, ¶¶ 149-153 (2004).

¹⁰ See, e.g., Comments of Paxson Communications Corporation, MB Docket No. 02-277 (filed March 19, 2004); Comments of Univision Communications, Inc., MB Docket No. 02-277 at 2, 6-7 (filed March 19, 2004); Comments Regarding the Status of the UHF Discount of Fox Entertainment Group, Fox Television Stations, National Broadcasting Company, Inc., Telemundo Communications Group, Inc., and Viacom, MB Docket No. 02-277 at 6-10 (filed March 19, 2004).

¹¹ CAA, § 629; 47 C.F.R. § 73.3555(d)(2)(i) (2005); Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, 92-94 (1985); see also *Prometheus*, 373 F.3d at 396-96.

that when Congress uses administratively defined terms it intends those terms to have the meaning the agency has assigned.¹² Therefore, Congress's use of the term "National audience reach" in the CAA demonstrates its intention that the UHF Discount remain in place.

Moreover, Congress amended the statutory section governing the Commission's periodic ownership rule reviews to *exclude* from those reviews consideration of the new 39% national audience reach cap and "any rules relating to" the cap.¹³ Unquestionably, the UHF Discount is a rule relating to the calculation of national audience reach for the purposes of determining compliance with the national audience reach cap. By using this language, Congress explicitly expressed its intention to insulate the UHF Discount from reconsideration in periodic review proceedings like this one.

The legislative history of the CAA also confirms that Congress was aware of and approved the continued application of the existing UHF Discount. Several legislators in both the House and the Senate made speeches during floor debate noting that the 39% limit was specifically selected to allow group owners that currently own stations that reach more than 35% of American households to retain their holdings.¹⁴ Holding that the statute leaves the FCC free to reconsider its retention of the UHF Discount would be entirely unreasonable and directly contrary to Congress's understanding of the CAA's impact. Indeed, to read the CAA to permit alteration of the UHF Discount in a periodic review proceeding, the Commission would have to

¹² *Prometheus*, 373 F.3d at 396 (citing *Bragdon v. Abbott*, 524 U.S. 624, 63 (1998)).

¹³ CAA, § 629 (amending Section 202(h) to provide for quadrennial review of ownership rules and specifically excluding "any rules relating to the 39% national audience reach limitation" from those review proceedings):

¹⁴ See 150 Cong. Rec. S18 (daily ed. Jan. 20, 2004) (statement of Senator Kohl); 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Senator Byrd); 150 Cong. Rec. S83 (daily ed. Jan. 21, 2004) (statement of Senator Durbin); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain).

find that Congress intended to provide the Commission with a back door it could use to circumvent Congress's judgment that 39% is the proper level for the national cap. Such a reading of the statute would be plainly arbitrary and capricious and could not withstand judicial review.

The Third Circuit adopted the plain meaning analysis of the CAA outlined above when it reviewed the *2003 Biennial Ownership Order* in *Prometheus*.¹⁵ The Court found that challenges to the Commission's decision to retain the UHF Discount in the 2002 Biennial Review were "moot" because "Congress's specification of a precise 39% cap" in the CAA could be satisfied only by retaining the UHF Discount.¹⁶ The Court also pointed out that the language of the statute precludes consideration of the 39% cap and related rules in the Commission's periodic review proceedings.¹⁷ As a result, the *Prometheus* court held that the "UHF Discount is insulated from . . . periodic review;" consequently, the Commission now may evaluate the future of the UHF Discount only outside the Section 202(h) periodic review process.¹⁸ The Third Circuit's construction of the CAA in *Prometheus* therefore requires the Commission to cease consideration of the UHF Discount in this proceeding. Under the *Prometheus* decision, the Commission may consider the UHF Discount only in a separate proceeding.

In the *FNPRM*, the Commission recognized that the Third Circuit held that the Commission could consider the UHF Discount only in a separate future proceeding.¹⁹ It nonetheless asks whether that finding creates any ambiguity in the Court's decision that the UHF

¹⁵ *Prometheus*, 373 F.3d 396-97.

¹⁶ *Id.* at 396.

¹⁷ *Id.* at 397.

¹⁸ *Id.*

¹⁹ *FNPRM*, ¶ 34.

Discount must be excluded from the Commission's periodic ownership reviews.²⁰ Plainly the answer to this question is no. The Third Circuit did indicate that the Commission may consider changes to the UHF Discount outside the context of the periodic review process, but obviously that does not give the Commission authority to consider the UHF Discount in the present proceeding which consists solely of a reconsideration of the 2002 periodic review and the initiation of the 2006 periodic review. No ambiguity exists. The UHF Discount must be excluded from this proceeding.

II. There is no Basis for Modifying or Eliminating the UHF Discount Now.

Even if the CAA and *Prometheus* permitted the Commission to examine the UHF Discount in this proceeding, there is no basis for modifying or eliminating the UHF Discount today. The Commission has upheld the UHF Discount on a full record twice since 1998.²¹ In the 2002 Biennial review, the overwhelming weight of the evidence before the Commission demonstrated that:

- **UHF signals actually reach fewer viewers than their VHF competitors.** This is a function of both the technical inferiority of UHF broadcasters' signals and the design of the cable and DBS must-carry rules, which require that a broadcaster be able to send a high quality signal to each cable system to gain carriage on that system. Because UHF broadcasters' signal reach is smaller, they reach fewer cable systems. This results in smaller audiences and revenues for UHF broadcasters.
- **UHF Stations are more expensive to build and operate than VHF stations.** Due to more expensive equipment and ongoing power costs, UHF stations cost considerably more than their VHF counterparts to build and operate. This simply functions as an additional drain on investment in programming and service improvements that is already hampered by the lower advertising rates associated with UHF stations' inferior signal coverage area.

²⁰ *Id.*, ¶ 35.

²¹ See 2000 Biennial Review Report, 15 FCC Rcd 11058, 11072-74 (2000); 2003 Biennial Ownership Order, 18 FCC Rcd at 13845-47.

- **UHF stations produce lower ratings than their VHF competitors, even when the UHF and VHF stations are airing the same programming.** The only evidence currently available demonstrates that UHF stations gain lower ratings solely because they are UHF stations and for no other reason.
- **The UHF Discount has facilitated the birth and growth of new networks like ION and Univision, which serves the nation's Spanish-speaking community.**

The Commission recognized these facts in the 2002 Biennial Review, holding that the UHF Discount (1) “strengthen[s] competition” by compensating UHF stations for the historical competitive handicap that their weaker signals have created; and (2) encourages new and emerging networks like Univision and ION to integrate UHF stations into their national programming plans.²² None of the facts or the ineluctable conclusions that flow from them have changed since the Commission completed the 2002 Biennial Review.

Moreover, modifying or eliminating the UHF Discount now would be extremely disruptive to the marketplace because – as Congress intended – several station group owners, including ION, Univision, Viacom, Fox, and Tribune continue to rely on the UHF Discount for compliance with the national audience reach cap. No party to any Commission proceeding has ever provided any evidence that the UHF Discount harms the public interest in any way and the Commission itself has repeatedly found that the UHF Discount fosters competition. There is no basis for disrupting the settled expectations of those station owners and networks that have relied on the Commission's and Congress's repeated approval of the UHF Discount. The UHF Discount is a positive force in the over-the-air broadcasting industry and when the Commission decides to evaluate the UHF Discount, the Commission must take steps to ensure that it continues in its current form, at least through the close of the DTV transition.

²² *2003 Biennial Ownership Order*, 18 FCC Rcd at 13846-47.

III. The Commission Should Institute a Separate Proceeding To Consider the Future of the UHF Discount Following the DTV Transition.

ION has long advocated that the Commission should institute a proceeding at some point at the end of the DTV transition to evaluate the continuing need for the UHF Discount and to determine whether the UHF Discount should be redesigned to ensure that it continues to ameliorate the competitive handicap borne by traditional analog UHF stations.²³ In light of the Prometheus Court's finding that the "UHF Discount is insulated from . . . periodic review," beginning a new proceeding at some point is not only the best course from a public policy standpoint, it is also the only way the Commission can begin consideration of post-transition UHF Discount issues.

The question of whether and how the UHF Discount should continue in the post-transition environment is much more complicated than the Commission's prior pronouncements have implied.²⁴ When the Commission begins to analyze the competitive position of UHF stations, it will realize that it must preserve some form of the UHF Discount to ensure fair competition and the health of stations that historically have been analog UHF's. While the Commission may be correct that some UHF stations will benefit by gaining more powerful facilities, ION already has provided evidence that many stations still will face a significant signal strength disadvantage compared to other stations in their

²³ See n.6, *supra*.

²⁴ For example, in the *2003 Biennial Ownership Order*, the Commission tentatively concluded that the DTV transition will eliminate the need for the UHF Discount for stations that are owned by, operated by, and affiliated with the four major television networks (Fox, NBC, CBS, and ABC) and for these stations, the Commission decided that the UHF Discount would sunset at the close of the DTV transition. 18 FCC Rcd at 13847. The Commission previously had presumed that it would initiate a proceeding to consider a UHF Discount phase-out at some time prior to the DTV transition. *2000 Biennial Review Report*, 15 FCC Rcd at 11079-80.

markets.²⁵ Moreover, as ION has explained, the Commission cannot presume that the crippling competitive handicap imposed on stations that have had analog UHF signals suddenly will be corrected if those stations are assigned VHF DTV channels or permitted to maximize their DTV facilities.²⁶ Much of the handicap UHF stations face, particularly in major markets, is based on the fact that they typically have not enjoyed Big 4 network affiliation and that they have occupied relatively inconvenient high channel positions on the television dial. Indeed, the evidence before the Commission continues to show that the major networks actively avoid using UHF stations as network affiliates.²⁷ Coupled with the traditional signal disparity, the lack of as large an established viewership will continue to affect all analog UHF stations regardless of whether they gain stronger signals or VHF channels through the DTV transition. The resulting competitive handicap will not, therefore, vanish with the transition.

The Commission also has not yet begun to decide how its future UHF Discount policies will affect new emerging networks like ION and Univision. The Commission has found that this is one of the most important public benefits of the UHF Discount, but it has not even begun to explore what would happen to these networks if the UHF Discount ceases to exist. That question should be a main focal point of the Commission's separate proceeding addressing UHF Discount issues.

To resolve these complex and important technical and policy questions, to Commission must develop an in-depth record, which it is unlikely to receive in the current

²⁵ See Letter from John R. Feore, Jr., counsel for Paxson Communications Corporation, to Marlene H. Dortch, MB Docket No. 02-277 at Attachment 1 (filed May 16, 2003).

²⁶ See *id.* at 4 and Attachment 1.

²⁷ 2003 Biennial Ownership Order, 18 FCC Rcd at 13847.

Quadrennial Review proceeding with its myriad of issues. Although the Commission has indicated in the past that it would begin any such proceeding before the end of the DTV transition, as a practical matter, the Commission will not be able to compile the record it needs to evaluate the continuing need for the UHF Discount until stations have discontinued analog operations and are operating exclusively in digital. Only then will the Commission have the information it needs to evaluate the competitive position of traditional UHF stations and determine whether those stations can continue to thrive without the UHF Discount.

Given the requirements of the CAA and the *Prometheus* decision and the uncertainty of the future need for the UHF Discount, the only reasonable course available to the Commission is to: (1) sever continued consideration of the UHF Discount from the current periodic review; and (2) commence a separate proceeding at the end of the transition or at some point after analog shut-off has been accomplished designed to determine what form the UHF Discount should take in the post-DTV transition broadcasting industry.

CONCLUSION

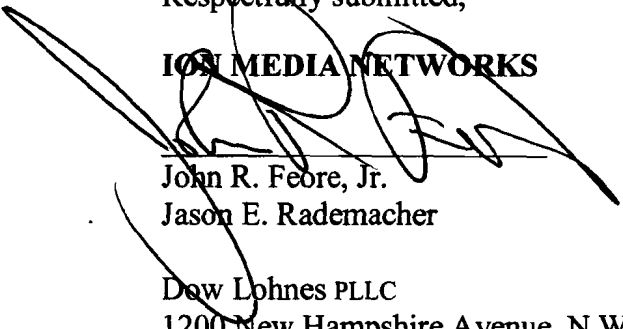
Fir the foregoing reasons, the Commission should promptly eliminate consideration of the UHF Discount from this proceeding and announce that it will conduct a separate future rulemaking to consider the UHF Discount. The plain language of the CAA, as confirmed by the Third Circuit's decision in *Prometheus* precludes the Commission from considering changes to the UHF Discount in this proceeding. The UHF Discount is an integral part of the 39% national audience reach cap that Congress has established and Congress prohibited the Commission from using the periodic review process to undo the cap or related rules.

Even if the Commission had the authority, this proceeding would be the wrong place and the wrong time to address the complex and important issues raised by potential changes to the UHF Discount. For more than 20 years the UHF Discount has worked to level the playing field between UHF and VHF stations and has contributed to the birth and growth of new networks like ION and Univision. Immediate elimination of the UHF Discount would undo the progress that UHF stations have made with the UHF Discount's aid. Moreover, it is by no means clear that the DTV transition will substantially ameliorate the need for the UHF Discount. Indeed, the early indications are that while the DTV transition may improve UHF stations' signal strength, substantial competitive handicaps stemming from stations' historical UHF status will remain.

The Commission should examine these issues in a separate proceeding where it can develop a complete record that will facilitate the thoughtful consideration of these issues that the public interest demands.

Respectfully submitted,

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John R. Feore, Jr.

Jason E. Rademacher

Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802
(202) 776-2000

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